Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RAUL CHAVEZ-ZARZA, RAMIRO LUA-GARCIA, AND ALBERTO OCHOA-GRANADOS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Fifth Circuit Court of Appeals held that the enhanced penalties in 8 U.S.C. § 1326(b) are sentencing provisions, not elements of separate offenses. Therefore, the Fifth Circuit Court of Appeals held that the petitioners prior aggravated felony convictions did not have to be alleged in the indictments.

1. Whether the district court should have found that a prior aggravated felony, when used in 8 U.S.C. § 1326(b)(2), is an element of the offense, and therefore, must be pled in the indictment.

2. Whether the district court violated the petitioners' due process rights by imposing a sentence greater than the 2-year maximum sentence permissible under 8 U.S.C. § 1326 since the government did not plead the petitioners' prior aggravated felony within the indictment.

PARTIES TO THE PROCEEDINGS

Petitioners are Raul Chavez-Zarza, Ramiro Lua-Garcia, and Alberto Ochoa-Granados. Respondents are Mr. Johnny K. Sutton, United States Attorney for the Western District of Texas, and Mr. Joseph Gay, Assistant United States Attorney for the Western District of Texas.

PETITION FOR A WRIT OF CERTIORARI

Raul Chavez-Zarza, Ramiro Lua-Garcia, and Alberto Ochoa-Granados respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in these cases.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit are unpublished. The opinions of the United States District Court are also unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided Raul Chavez-Zarza's and Alberto Ochoa-Granados's cases was August 21, 2002. The date on which the United States Court of Appeals decided Ramiro Lua-Garcia's case was August 22, 2002. No petition for rehearing was timely filed in any of these cases. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . . " The Sixth Amendment to the United

States Constitution provides in relevant part that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . . " The pertinent provisions of 8 U.S.C. § 1326 are reprinted in an appendix to this petition.

STATEMENT

The defendants pled guilty to a one-count indictment charging the defendants with violating 8 U.S.C. § 1326 by illegally re-entering the United States without the permission of the United States Attorney General after being previously deported, excluded or removed from the United States.

On November 13, 2001, the court held a sentencing hearing for Raul Chavez-Zarza, and entered final judgment on November 13, 2001. On February 11, 2002, the court held sentencing hearings for Ramiro Lua-Garcia and Alberto Ochoa-Granados, and entered final judgments in both cases on February 12, 2002.

The district court sentenced Raul Chavez-Zarza to 41 months in prison, Ramiro Lua-Garcia to 46 months in prison, and Alberto Ochoa-Granados to 57 months in prison. Raul Chavez-Zarza filed his notice of appeal on November 13, 2001, Ramiro Lua-Garcia on February 14, 2002, and Alberto Ochoa-Granados on February 14, 2002.

On appeal, the defendants argued that the sentences they received violated their due process rights under *Apprendi v. New Jersey,* 530 U.S. 466 (2000). On August 21, 2002, the Fifth Circuit Court of Appeals affirmed Raul Chavez-Zarza's and Alberto Ochoa-Granados's sentences.

On August 22, 2002, the Fifth Circuit Court of Appeals affirmed Ramiro Lua-Garcia's sentence.

REASONS FOR GRANTING THE PETITION

The Supreme Court has left no doubt that the lower courts of appeals are compelled to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it. *United States v. Dabeit,* 231 F.3d 979, 984 (5th Cir. 2000) (*writ denied,* 531 U.S. 1202 (2001)). Consequently, the Fifth Circuit Court of Appeals, along with other circuits, has continued to apply the Supreme Court's ruling in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) in spite of the Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). *See United States v. Delgado-Nunez,* 295 F.3d 494, 498 (5th Cir. 2002) (*n.w.h.*). However, the decisions in *Almendarez-Torres* and *Apprendi* appear to be in conflict, and only the Supreme Court can resolve this issue. *See United States v. Rodriguez-Montelongo,* 263 F.3d 429, 434 (5th Cir. 2001) (*n.w.h.*). The Ninth Circuit has stated that *Apprendi* calls *Almendarez-Torres*'s continuing viability into serious question. *See Jones v. Smith,* 231 F.3d 1227, 1235 (9th Cir. 2000) (*n.w.h.*). The purpose of this petition for writ of certiorari is to seek an opportunity to contest the decision in *Almendarez-Torrez* in light of the Court's decision in *Apprendi.*

The petitioners were charged by indictment with the offense of illegal re-entry in violation of 8 U.S.C. § 1326. The statute provides for graduated penalties depending on a defendant's prior criminal history. Under § 1326(a), defendants who re-enter after deportation are subject to a

two-year maximum sentence. Under § 1326(b)(1), defendants who are deported after a conviction for an aggravated felony, or after three-misdemeanor drug offenses or crimes of violence, are subject to a maximum sentence of ten years. Under § 1326(b)(2), defendants deported after a conviction for an aggravated felony are subject to a maximum sentence of twenty years.

In *Almendarez-Torres v. United States,* the United States Supreme Court held that 8 U.S.C. § 1326(b)(2) is a penalty provision and does not define a separate crime, and therefore, a prior conviction supporting a sentence enhancement does not need to be charged in the indictment. However, in *Apprendi v. New Jersey*, the Supreme Court's majority opinion stated that *Almendarez-Torres* represents at best an exceptional departure from the historic practice of requiring that every fact that increases the maximum punishment be treated as an element of the offense. *Apprendi,* 530 F.3d at 487.

As a result of *Apprendi,* the petitioners moved to dismiss the government's notice of penalty enhancement which alleged that the petitioners were subject to an enhanced sentencing range based on a prior aggravated felony under 8 U.S.C. § 1326(b)(2). The petitioners argued that, under *Apprendi,* the petitioners' prior aggravated felonies were an element of a separate offense in § 1326(b)(2), and thus, should have been charged by indictment, submitted to the jury, and proven beyond a reasonable doubt.

Therefore, according to *Apprendi,* the district court should have required the government to plead the petitioners' prior felony convictions in the indictments and

should have dismissed the government's notices of enhancement.

CONCLUSION

In *Apprendi,* the Supreme Court did not overturn the decision in *Almendarez-Torres* because the petitioner did not contest the decision's validity, but the Court conceded that "it is arguable that *Almendarez-Torres* was incorrectly decided." *Apprendi,* 530 F.3d at 489-90. In order for this issue to be resolved, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS ELIAS LOPEZ
Counsel of Record
RYAN J. REBE
Attorneys at Law
300 East Main, Suite 700
El Paso, Texas 79901
(915) 543-9800

Counsel for the Petitioners

November 2002

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-51295
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAUL CHAVEZ-ZARZA, also known as Romero Gonzalez-Zarza,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. ER-01-CR-1125-1-EP

(Filed Aug. 21, 2002)

Before HIGGINBOTHAM, DAVIS, and PARKER, Circuit Judges.

PER CURIAM:*

Raul Chavez-Zarza ("Chavez") appeals the sentencing following his guilty plea conviction for illegal reentry into

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the United States following deportation in violation of 8 U.S.C. § 1326(a) and (b)(2). Chavez argues that the felony conviction that resulted in his increased sentence under 8 U.S.C. § 1326(b)(2) was an element of the offense that should have been charged in his indictment. He also argues that in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the district court erred in imposing a sentence greater than the two-year maximum sentence permissible under 8 U.S.C. § 1326 because the Government did not plead Chavez' prior aggravated felony in the indictment.

Chavez acknowledges that his arguments are foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but he seeks to preserve the issues for Supreme Court review. *Apprendi* did not overrule *Almendarez-Torres*. *See Apprendi*, 530 U.S. at 489-90; *see also United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000), *cert. denied*, 531 U.S. 1202 (2001). Chavez' argument is foreclosed. *See Almendarez-Torres*, 523 U.S. at 235.

For the foregoing reasons Chavez' sentence is AFFIRMED.

AO 245 S (Rev. 4/91) (W.D.Tx. rev.) Sheet 1 – Judgment in a Criminal Case

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UNITED STATES DISTRICT COURT
Western District of Texas

UNITED STATES OF AMERICA

v. Case Number EP-01-CR-1125-ECP
(Filed [Illegible])

RAUL CHAVEZ-ZARZA aka Romero Gonzalez-Zarza

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, RAUL CHAVEZ-ZARZA aka Romero Gonzalez-Zarza, was represented by Louis Lopez.

The defendant pled guilty to the indictment on October 23, 2001. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
8 U.S.C. 1326	Illegal re-entry	6-8-01	1

As pronounced on November 13, 2001, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 which shall

be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this 21st day of November, 2001.

/s/ Edward C. Prado
EDWARD C. PRADO
United States District Judge

Defendant's Date of Birth: 9-2-72
Defendant: RAUL CHAVEZ-ZARZA
aka Romero Gonzalez-Zarza
Case Number: EP-01-CR-1125-ECP

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of forty-one (41) months.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be committed at F.C.I., La Tuna, Texas.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall comply with the following additional conditions:

___ If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office for the district in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

___ The defendant shall not own or possess a firearm or destructive device.

_X_ The defendant shall not enter the United States without legal documents.

X The mandatory drug testing provision of the Violent Crime Control and Law Enforcement Act of 1994 is suspended.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50175
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMIRO LUA-GARCIA,
also known as Gerardo Paulido-Garcia,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-01-CR-1415-ALL-DB

(Filed Aug. 22, 2002)

Before HIGGINBOTHAM, DAVIS, and PARKER, Circuit Judges.

PER CURIAM:*

Ramiro Lua-Garcia appeals the sentence imposed following his guilty plea conviction of being found in the United States after removal in violation of 8 U.S.C. § 1326.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Lua-Garcia contends that 8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b)(2) define separate offenses. He argues that the aggravated felony conviction that resulted in his increased sentence is an element of the offense under 8 U.S.C. § 1326(b)(2) that should have been alleged in his indictment. Lua-Garcia maintains that he pleaded guilty to an indictment which charged only simple reentry under 8 U.S.C. § 1326(a). He argues that his sentence exceeds the two-year maximum term of imprisonment which may be imposed for that offense.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998), the Supreme Court held that the enhanced penalties in 8 U.S.C. § 1326(b) are sentencing provisions, not elements of separate offenses. The Court further held that the sentencing provisions do not violate the Due Process Clause. *Id.* at 239-47. Lua-Garcia acknowledges that his argument is foreclosed by *Almendarez-Torres*, but asserts that the decision has been case into doubt by *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). He seeks to preserve his argument for further review.

Apprendi did not overrule *Almendarez-Torres*. *See Apprendi*, 530 U.S. at 489-90; *United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000), *cert. denied*, 531 U.S. 1202 (2001). This court must follow *Almendarez-Torres* "unless and until the Supreme Court itself determines to overrule it." *Dabeit*, 231 F.3d at 984 (internal quotation marks and citation omitted). The judgment of the district court is AFFIRMED.

The Government has moved for a summary affirmance in lieu of filing an appellee's brief. In its motion, the Government asks that the judgment of the district court

be affirmed and that an appellee's brief not be required. The motion is GRANTED.

AFFIRMED; MOTION GRANTED.

AO 245 S (Rev. 4/91) (W.D.Tx. rev.) Sheet 1 – Judgment in a Criminal Case

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UNITED STATES DISTRICT COURT
Western District of Texas

UNITED STATES OF AMERICA

v. Case Number EP-01-CR-1415-DB
(Filed Feb. 12, 2002)

RAMIRO LUA-GARCIA, AKA:
GERARDO PAULIDO-LOPEZ

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, RAMIRO LUA-GARCIA, AKA: GERARDO PAULIDO-LOPEZ, was represented by Louis Lopez.

The defendant pled guilty to the indictment on November 27, 2001. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
8 U.S.C. 1326	Illegal Re-Entry	7-19-01	1

As pronounced on February 11, 2002, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this 12th day of February, 2002.

/s/ David Briones
DAVID BRIONES
United States District Judge

Defendant's Date of Birth: 7-25-67
Defendant: RAMIRO LUA-GARCIA, AKA:
GERARDO PAULIDO-LOPEZ
Case Number: EP-01-CR-1415-DB

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of forty-six (46) months.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be committed at F.C.I., Terminal Island, California.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on non-reporting supervised release for a term of three (3) years.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

X The defendant shall not enter the United States without legal documents.

X The mandatory drug testing provision of the Violent Crime Control and Law Enforcement Act of 1984 is suspended.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgement:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If the judgment imposed a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with a schedule to be approved by the Court. In any case, the defendant shall cooperate with the Probation Officer in meeting any financial obligations.

4) In supervised release cases only, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not possess a firearm as defined in 18 U.S.C. §921.

6) For offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment or placement on probation and at least two periodic drug tests thereafter, as directed by the Probation Officer. The above drug testing condition may be suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

7) The defendant shall not leave the judicial district without the permission of the Court or Probation Officer.

8) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

9) The defendant shall answer truthfully all inquires by the Probation Officer and follow the instructions of the Probation Officer.

10) The defendant shall support his or her dependents and meet other family responsibilities.

11) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training or other acceptable reasons.

12) The defendant shall notify the Probation Officer ten days prior to any change in residence or employment.

13) The defendant shall refrain from excessive use of alcohol.

14) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

15) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

16) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

17) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

18) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

19) As directed by the Probation Officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the Probation Officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guidelines Range Determined by the Court:

Total Offense Level:	21
Criminal History Category:	III
Imprisonment Range:	46 months to 57 months
Supervised Release Range:	2 to 3 years
Fine Range:	$7,500.00 to $75,000.00
Restitution:	$

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50194
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALBERTO OCHOA-GRANADOS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-01-CR-1410-ALL-DB

(Filed Aug. 21, 2002)

Before HIGGINBOTHAM, DAVIS, and PARKER, Circuit Judges.

PER CURIAM:*

Alberto Ochoa-Granados appeals the sentence imposed following his guilty plea conviction of being found in the United States after deportation in violation of 8 U.S.C. § 1326. Ochoa-Granados contends that 8 U.S.C. § 1326(a)

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and 8 U.S.C. § 1326(b)(2) define separate offenses. He argues that the aggravated felony conviction that resulted in his increased sentence is an element of the offense under 8 U.S.C. § 1326(b)(2) that should have been alleged in his indictment. Ochoa-Granados maintains that he pleaded guilty to an indictment which charged only simple reentry under 8 U.S.C. § 1326(a). He argues that his sentence exceeds the two-year maximum term of imprisonment which may be imposed for that offense.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998), the Supreme Court held that the enhanced penalties in 8 U.S.C. § 1326(b) are sentencing provisions, not elements of separate offenses. The Court further held that the sentencing provisions do not violate the Due Process Clause. *Id.* at 239-47. Ochoa-Granados acknowledges that his argument is foreclosed by *Almendarez-Torres*, but asserts that the decision has been cast into doubt by *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). He seeks to preserve his argument for further review.

Apprendi did not overrule *Almendarez-Torres*. *See Apprendi*, 530 U.S. at 489-90; *United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000), *cert. denied*, 531 U.S. 1202 (2001). This court must follow *Almendarez-Torres* "unless and until the Supreme Court itself determines to overrule it." *Dabeit*, 231 F.3d at 984 (internal quotation marks and citation omitted). The judgment of the district court is AFFIRMED.

The Government has moved for a summary affirmance in lieu of filing an appellee's brief. In its motion, the Government asks that the judgment of the district court

be affirmed and that an appellee's brief not be required. The motion is GRANTED.

AFFIRMED; MOTION GRANTED.

AO 245 5 (Rev. 4/91) (W.D.Tx. rev.) Sheet 1 – Judgment in a Criminal Case

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UNITED STATES DISTRICT COURT
Western District of Texas

UNITED STATES OF AMERICA

v. Case Number EP-01-CR-1410-DB
(Filed Feb. 12, 2002)

ALBERTO OCHOA-GRANADOS, AKA: JUAN HERNANDEZ-OREJEL

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ALBERTO OCHOA-GRANADOS, AKA: JUAN HERNANDEZ-OREJEL, was represented by Louis Lopez.

The defendant pled guilty to the indictment on December 14, 2001. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
8 U.S.C. 1326	Illegal Re-Entry	7-19-01	1

As pronounced on February 11, 2002, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this 12th day of February, 2002.

/s/ David Briones
DAVID BRIONES
United States District Judge

Defendant's Date of Birth: 10-20-72
Defendant: ALBERTO OCHOA-GRANADOS,
AKA: JUAN HERNANDEZ-OREJEL
Case Number: EP-01-CR-1410-DB

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of fifty-seven (57) months.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be committed at F.C.I., Terminal Island, California and that the defendant be allowed to participate in the Comprehensive Drug Treatment Program at the designated institution.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on non-reporting supervised release for a term of three (3) years.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

_X_ The defendant shall not enter the United States without legal documents.

_X_ The mandatory drug testing provision of the Violent Crime Control and Law Enforcement Act of 1984 is suspended.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgement:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If the judgment imposed a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with a schedule to be approved by the Court. In any case, the defendant shall cooperate with the Probation Officer in meeting any financial obligations.

4) In supervised release cases only, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not possess a firearm as defined in 18 U.S.C. §921.

6) For offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment or placement on probation and at least two periodic drug tests thereafter, as directed by the Probation Officer. The above drug testing condition may be suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

7) The defendant shall not leave the judicial district without the permission of the Court or Probation Officer.

8) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

9) The defendant shall answer truthfully all inquires by the Probation Officer and follow the instructions of the Probation Officer.

10) The defendant shall support his or her dependents and meet other family responsibilities.

11) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training or other acceptable reasons.

12) The defendant shall notify the Probation Officer ten days prior to any change in residence or employment.

13) The defendant shall refrain from excessive use of alcohol.

14) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

15) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

16) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

17) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

18) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

19) As directed by the Probation Officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the Probation Officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guidelines Range Determined by the Court:

Total Offense Level:	21
Criminal History Category:	IV
Imprisonment Range:	57 months to 71 months
Supervised Release Range:	2 to 3 years
Fine Range:	$7,500.00 to $75,000.00
Restitution:	$

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

8USC1326

CITE

8 USC Sec. 1326 01/05/99

EXPCITE

TITLE 8 – ALIENS AND NATIONALITY
CHAPTER 12 – IMMIGRATION AND NATIONALITY
SUBCHAPTER II – IMMIGRATION
PART VIII – General Penalty Provisions

HEAD

Sec. 1326. Reentry of removed aliens

STATUTE

(a) In general – Subject to subsection (b) of this section, Any alien who –

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (a) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (b) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reeentry of certain removed aliens Notwithstanding subsection (a) of

this section, in the case of any alien described in such subsection –

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felong [sic]), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both; (3) who has been excluded from the United States pursuant to section 1225 © [sic] of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. (FOOTNOTE 1) or (FOOTNOTE 1) So in original. The period probably should be a semicolon. (4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, imprisoned for not more than 10 years, or both. For the purposes of this subsection, the term "removal" includes any agreement in

which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.